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No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1982

WAYNE N. HOWARD and MICHAEL E. TRAUSCHT,
Petitioners and Cross-Respondents,

v.

WALTER ROBERT TAYLOR,
Respondent and Cross-Petitioner.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOHN C. McMURRY
625 N. W. 13th Street
Oklahoma City, Oklahoma 73103
(405) 528-3008

Counsel for Respondent and Cross-Petitioner, Walter Robert Taylor

November, 1982

QUESTIONS PRESENTED FOR REVIEW

1. Is the "color of state law" requirement of 42 U.S.C. § 1983 satisfied by the "state action" of a state court's ordering violation of a citizen's First and Fourteenth Amendment rights?

2. In ascertaining what is and is not "state action", is state court action enforcing racially restrictive covenants distinguishable from state court action committing an adult citizen to the custody of another to be "counseled", "examined" and "treated" and his will?

3. Does the history of 42 U.S.C. § 1983 indicate that it should be applied to prevent the use of state courts to injure citizens and that it should be applied to enforce provisions of the Constitution against all state action, whether legislative, executive or judicial?

4. Is the action of conspirators in using a state court "temporary guardianship" order to take and retain custody of an adult citizen to abuse him mentally and to force him to change his religion and lifestyle, "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with authority of the state"?

5. Is the power and authority stated in and exercised under a state court "temporary guardianship" order providing for confinement, "counseling", "examination" and "treatment" of an adult citizen, "power possessed by virtue of state law and made possible only" as a result of "being clothed with authority of the state"?

6. Is such action (Questions 4 and 5) merely the action of private individuals akin to filing a complaint, testifying at trial and being on the winning side of a law-

suit, or is it the exercise of apparent authority and power of the state in the form of the "temporary guardianship" order?

7. Do private citizens have the apparent authority to confine, "counsel", "examine" and "treat" another adult citizen against his will, or is such apparent authority only exercisable through color of law?

8. Is the action of private persons in confining, "counseling", "examining" and "treating" another citizen against his will pursuant to a court order so impregnated with governmental character as to become subject to the constitutional limitations placed upon state action?

9. If a state court proceeding is a nullity, is there "color of law" under 42 U.S.C. § 1983 when conspirators misuse the state judicial process with the specific intent of depriving a citizen of his liberty without due process, equal protection of the laws and other rights guaranteed by the Constitution?

PARTIES

The parties in the United States Court of Appeals for the Tenth Circuit were: Walter Robert Taylor, appellant, and Kevin M. Gilmartin, Michael E. Trauscht, Wayne N. Howard, The Freedom of Thought Foundation, Inc., Joseph Alexander, Esther Alexander and Gary Scharff, appellees. It is urged by Petitioners that all of these parties have an interest in the filing of their petition.

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Respondent and Cross-Petitioner.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Walter Robert Taylor, Respondent and Cross-Petitioner, prays that, in the event a writ of certiorari should issue to the United States Court of Appeals for the Tenth Circuit to review that part of its July 30, 1982 judgment which reversed the Trial Court's December 30, 1978 and December 29, 1979 orders granting partial summary judgment against Respondent and Cross-Petitioner and dismissing his claim based upon 42 U.S.C. § 1985, then in such event Respondent and Cross-Petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Tenth Circuit to review that part of its July 30, 1982 judgment which affirmed the Trial Court's December 30, 1978 and July 8, 1980 orders granting partial summary judgment against Respondent and Cross-Petitioner and dismissing his claim based upon 42 U.S.C. § 1983.

OPINIONS BELOW

The December 30, 1978 order of the United States District Court for the Western District of Oklahoma which granted partial summary judgment against Respondent and Cross-Petitioner dismissing his claim based upon 42 U.S.C. § 1983 is reproduced in the Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit ("Appendix to Petition") filed by Petitioners and Cross-Respondents Wayne N. Howard and Michael E. Trauscht. The July 8, 1980 order of the United States District Court for the Western District of Oklahoma granting partial summary judgment against Respondent and Cross-Petitioner dismissing his claim based upon 42 U.S.C. § 1983 is reproduced in the Appendix to this Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit. The opinion of the United States Court of Appeals for the Tenth Circuit which affirmed those orders granting partial summary judgment against Respondent and Cross-Petitioner on his 42 U.S.C. § 1983 claim is reproduced in the Appendix to the Petition filed by Petitioners and Cross-Respondents. It has not yet been reported in the official reporter.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit sought to be reviewed is dated and was entered July 30, 1982. Respondent and Cross-Petitioner relies upon *Sup. Ct. R.* 19.5. Petitioners' petition for certiorari was received by counsel for Respondent and Cross-Petitioner October 21, 1982. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

United States Code, Title 42

Section 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

Plaintiff and Cross-Petitioner here is a monk who resides at an Old Catholic Monastery in a suburb of Oklahoma City. He was taken against his will from his monastery by Oklahoma County Sheriff's Deputies to a hearing before the District Court of Oklahoma County, State of Oklahoma, for a "temporary guardianship" hearing July 15, 1976. At the time he was 21 years old. Defendants sought Plaintiff's removal from his monastery in order that he could be "deprogrammed", a process which involves use of "confrontative" techniques of "counseling" with the goal of the "deprogrammee's" renunciation of his religious beliefs.

On July 14, 1976, lawyers for the applicant in the "temporary guardianship" proceeding conferred with the Associate District Judge to whom the application was eventually presented, Judge John A. "Tony" Benson, who then contacted the Probate Judge and requested that he be allowed to hear the matter. The "temporary guardianship"

proceeding was then filed. Judge Benson then conducted a hearing July 15, 1976, without notice to Plaintiff, and wholly in Plaintiff's absence which culminated in Judge Benson's ordering the Plaintiff taken into custody. Judge Benson had decided to order that a temporary guardian of Plaintiff's person be appointed so that it could be determined if Plaintiff were under the influence of a religious cult. Judge Benson stated that he wanted the Plaintiff taken into custody "so that [Plaintiff] could be given notice of a [permanent] guardianship hearing. . . ."

Upon Plaintiff's being taken to the Oklahoma Court, his counsel of choice was excluded from the hearing, and at the close of the "temporary guardianship" hearing, the same day Plaintiff was picked up by sheriff's deputies, Judge Benson, though finding that Plaintiff appeared "normal in every respect", formally entered an "Order Appointing Temporary Guardianship of the Person" because, according to Judge Benson:

> ". . . the right of [Plaintiff's] father and . . . family to know [Plaintiff] decided . . . to spend the rest of [his] life away from them secluded in a monastery . . . probably overrides any individual right [Plaintiff] might possibly have on a temporary basis . . . to be free from . . . custody."

The July 15, 1976 order provided:

> "1. Notice of the time and place of hearing is not required.
>
> 2. Dr. Walter Taylor is appointed the temporary Guardian of the Person of Petitioner's child, to-wit: Walter Robert Taylor and that temporary Letters of Guardianship issue.

3. The Temporary Guardian of the person shall have power to: (a) take said proposed ward into Petitioner's personal custody to have proposed ward counselled, examined, and treated by persons including, but not limited to physicians, psychiatrists, psychologists, social workers and lay persons; (b) to keep said ward in Petitioner's custody, even in the event said ward wishes to leave said custody; and (c) such further powers as are necessary to exercise those above granted.

4, Further hearing in this matter will be held at August 13, 1976 at 3:00 P.M. at which time the ward is directed to show cause if any the ward has, why the Petitioner, Dr. Walter Taylor should not be appointed permanent Guardian of the ward's person. . . . "

On authority of Judge Benson's "temporary guardianship" order (hereafter "Judge Benson's Order"), Plaintiff was taken that same day, July 15, 1976, from Oklahoma City, Oklahoma, to Akron, Ohio. He was held for approximately one week in Akron where he was kept at a motel under constant guard. There he underwent "deprogramming": (1) "deprogrammers" yelled at him constantly; (2) they kept fresh "deprogrammers" yelling at him by switching off in crews; (3) they said they would have him tracked down by the state patrol if he escaped, and that they would have him thrown in jail and "deprogrammed" in jail; (4) the "deprogrammers" threatened to have the police close down Plaintiff's monastery, to have the "temporary guardianship" made permanent and have the "deprogramming" continue indefinitely, to have Plaintiff committed to a mental institution and to beat him; (5) he was deprived of sleep and by innuendo he was told that he

would be subjected to shock treatment; (6) he suffered severe gastritis, diarrhea and abdominal cramping, and when he complained, the "deprogramming" seemed to intensify; (7) they threw cold water on him, shined a light in his eyes, tore his monastic clothes off him, and cut his hair and beard; (8) they told him they called friends and religious leaders from a list Plaintiff had given them of people who would vouch for him, and they stated that the friends reported his religion was not legitimate. The "deprogrammers" indicated the pressure would cease if Plaintiff would renounce his religion.

July 22, 1976, the District Court of Oklahoma County, acting through a different judge than Judge Benson, entered an order declaring Judge Benson's Order void ab initio which commanded Plaintiff's return to Oklahoma City. July 23 or July 24, 1976, Plaintiff was taken from Akron to Phoenix, Arizona, where he was held, still under guard, for the "rehabilitation" phase of the "deprogramming". He escaped July 31, 1976, and returned to Oklahoma City.

Plaintiff brought the instant action against the "deprogrammers", his parents and brother seeking $300,000.00 compensatory and $3,000,000.00 punitive damages. Jurisdiction was based upon 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1332 (diversity of citizenship), 28 U.S.C. § 1343 (3) and 28 U.S.C. § 1343(1) (civil rights). Pursuant to agreement Plaintiff's parents and brother were dismissed prior to trial. Plaintiff sought relief on the basis of a civil conspiracy and specific legal theories which included violation of civil rights under 42 U.S.C. §§ 1983 and 1985(3), obstruction of justice under 42 U.S.C. § 1985(2), intentional

infliction of emotional distress, false imprisonment and assault and battery. He stated in his Complaint that "Defendants conspired to and did, under color of law deprive Plaintiff of liberty . . . to coercively induce an alteration in Plaintiff's religious beliefs and practices", and that Defendants acted "under color of law through use of the judicial system, court orders and actions of the Sheriff's office. . . ." Plaintiff did not allege that either Judge Benson or the Sheriff's deputies who arrested him were co-conspirators of Defendants.

The Trial Court granted partial summary judgment against Plaintiff dismissing his 42 U.S.C. § 1983 count on the basis that the requisite color of state law was not present. It granted partial summary judgment against Plaintiff dismissing the 42 U.S.C. § 1985(3) count because it concluded that Plaintiff's action did not allege deprivations which would give rise to Congressional authority to reach private conspiracies. It granted partial summary judgment against Plaintiff dismissing his 42 U.S.C. § 1985(2) count on the basis that a source of Congressional power to reach the private conspiracy alleged could not be identified.

Trial of the action was to a jury. At the close of the evidence the court directed a verdict against Plaintiff on his false imprisonment claim on the basis that Judge Benson's Order was a "proper" order. The court also directed a verdict against Plaintiff on the intentional infliction of emotional distress claim, holding that the court was required in the first instance to determine whether Defendants' conduct was so "extreme" and "outrageous" as to permit recovery, and in the instant action, reasonable minds

could not differ: Defendants' conduct was not so "extreme" and "outrageous" as to permit the question to be submitted to a jury. The case then went to the jury solely on the theory of conspiracy to assault and batter. The jury returned a verdict in favor of the Defendants and against Plaintiff, and the court entered judgment on the verdict.

Plaintiff perfected an appeal to the United States Court of Appeals for the Tenth Circuit which, by opinion dated July 30, 1982, reversed the Trial Court's grant of summary judgment and the Trial Court's directed verdicts and judgment on jury verdict, except the Trial Court's dismissal of Plaintiff's claim based upon 42 U.S.C. § 1983. The Tenth Circuit held that "The order dismissing the § 1983 claim must be affirmed." While holding that Plaintiff's Complaint alleged a conspiracy to induce the State to violate his First and Fourteenth Amendment rights, the Court of Appeals concluded that there was no action taken under color of state law because the State of Oklahoma had merely furnished a forum to private litigants. Defendants then sought review by this Court of the Tenth Circuit's reversal of the Trial Court's grant of summary judgment dismissing Plaintiff's 42 U.S.C. § 1985 claims.

REASONS FOR GRANTING THE WRIT

This Cross-Petition should be granted because the United States Court of Appeals for the Tenth Circuit has decided a federal question in a way which conflicts with applicable decisions of this Court and because the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. The Court of Appeals' decision, while correctly holding that there was "state action" in the deprivation of rights secured by the First and Fourteenth Amendments to the Constitution, conflicts with applicable decisions of this Court in finding that the "state action" was not taken under "color of state law". The decision of the Court of Appeals conflicts with applicable decisions of this Court because it incorrectly found an absence of "color of state law", notwithstanding a misuse of power possessed by virtue of state law and made possible only because the wrongdoer was clothed with the authority of the State. The decision of the Court of Appeals that Defendants did not act under "color of state law" conflicts with applicable decisions of this Court because the involuntary "counseling", "examining" and "treating" of an adult is so impregnated with governmental character as to be subject to constitutional limitations. The Court of Appeals holding that Defendants did not act under "color of state law" where otherwise private individuals misused a state judicial proceeding which was a nullity for the purpose of effecting constitutional deprivations is incorrect and involves an important question of federal law which has not been, but should be, settled by this Court.

I. THE COURT OF APPEALS' DECISION, WHILE CORRECTLY HOLDING THAT THERE WAS "STATE ACTION" IN THE DEPRIVATION OF RIGHTS SECURED BY THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION, CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT IN FINDING THAT THE "STATE ACTION" WAS NOT TAKEN UNDER "COLOR OF STATE LAW".

Although finding that Plaintiff properly alleged that his First and Fourteenth Amendment rights were violated through "state action", the Circuit Court held that the "state action" was not taken under "color of law". Slip Opinion at 18-19, 26-32. That holding conflicts with applicable decisions of this Court.

A 42 U.S.C. § 1983 claim embodies at least two elements: (1) deprivation of a right secured by the Constitution and laws of the United States; (2) "under color of law". *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 155 (1978), *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 150 (1970). Although this Court held in *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. at 156-57, that action taken "under color of state law" does not entail deprivation of a right secured by the Constitution and laws of the United States when there is no state action, this Court has never found absence of "color of state law" where there was "state action" in the form of governmental deprivation of a First or Fourteenth Amendment right. On the contrary, ". . . conduct satisfying the state action requirement of the Fourteenth Amendment satisfies the statutory requirement of action under color of state law. . . ." *Lugar* v. *Edmondson Oil Co.*, 102 S.Ct. 2744, 2753, n. 18 (1982).

Although holding that there was no "color of law", the Circuit Court held:

> ". . . [A]lthough . . . [Plaintiff] does not claim that the state conspired to deprive him of his constitutional right, he does claim that the state unwittingly deprived him of those rights when the Sheriff's deputies forced Taylor to appear before Judge Benson under no apparent statutory authority and when the state court appointed his father temporary guardian without any jurisdiction, whereby he was illegally delivered over to the defendants and was deprived of his freedom of association and his freedom to pursue his religious beliefs. We must hold that a private conspiracy, if this be such, motivated by a class-based, invidiously discriminatory animus, to induce *the state to violate one's first and fourteenth amendment rights is remedied by* §§ 1985(2) and (3)."

Emphasis supplied. Slip Opinion at 31-32.

The Tenth Circuit's analysis below that there was "state action" is consistent with this Court's conclusion that judicial enforcement of racially restrictive covenants constitutes Fourteenth Amendment "state action":

> "The difference between judicial enforcement and non-enforcement is the difference between being denied rights . . . and being accorded full enjoyment of those rights on an equal footing."

Shelley v. *Kraemer,* 334 U.S. 1, 19 (1948).

Plaintiff's deprivation of liberty, freedom of association and freedom of religion were caused by the exercise of a putative state right or conduct imposed by the State in the form of Judge Benson's order. Defendants and Plaintiff's "temporary guardian" as authorized by, and act-

ing in accordance with, Judge Benson's order acted with state officials — Judge Benson and Oklahoma County Sheriff's deputies — or obtained significant aid from them. In conspiring with Plaintiff's "temporary guardian", Defendants were thus "state actors". *See Lugar* v. *Edmondson Oil Co.*, 102 S.Ct. at 2754.

The Court of Appeals' conclusion that there was no action taken under "color of state law" because the State merely furnished a forum or allowed itself to be used by the conspirators conflicts with applicable decisions of this Court and is inconsistent with the legislative history of 42 U.S.C. § 1983. The Civil Rights Act of 1871 does not provide an exemption or "safe harbour" for state action through judicial process. To the contrary, all state action, whether executive, legislative or judicial, may be reached under 42 U.S.C. § 1983. *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719, 735, n. 14 (1980), citing *Ex Parte Virginia*, 100 U.S. 339, 346 (1880). One of the evils which was to have been addressed by 42 U.S.C. § 1983 was the use of state courts to harass and injure citizens. *Id.* 42 U.S.C. § 1983 does not require that a judge be a conspirator as a prerequisite to relief for First and Fourteenth Amendment violations perpetrated under authority of a state court. Such a requirement would thwart the remedial purpose of the statute. That is the effect of the judgment of the Court of Appeals. Though finding "state action", it held that there was no "color of law" contrary to this Court's decision in *Lugar* v. *Edmondson Oil Co.*, *supra*.

The Tenth Circuit's response to the pronouncements of this Court in *Lugar* v. *Edmondson Oil Co.* is that *Lugar* is

distinguishable because Plaintiff does not contend that the Oklahoma guardianship statute is constitutionally defective. Slip Opinion at 19-20 n. 3. That factual analysis is correct, but it does not effectively distinguish the rationale of *Lugar* because Defendants acted under putative state authority in the form of Judge Benson's order which clearly authorized the constitutional violations. Plaintiff has specifically challenged the constitutionality of Judge Benson's order which facially provided state authorization for Defendants to "deprogram" Plaintiff thereby violating his First and Fourteenth Amendment rights.

II. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT BECAUSE IT INCORRECTLY FOUND AN ABSENCE OF "COLOR OF LAW", NOTWITHSTANDING A MISUSE OF POWER POSSESSED BY VIRTUE OF STATE LAW AND MADE POSSIBLE ONLY BECAUSE THE WRONGDOER WAS CLOTHED WITH THE AUTHORITY OF THE STATE.

Action taken under "color of law" as prescribed by 42 U.S.C. § 1983 is defined as

> "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of the state. . . ."

Monroe v. *Pape*, 365 U.S. 167, 184 (1961), *United States* v. *Classic*, 313 U.S. 299, 326 (1941).

Defendants took and retained custody of Plaintiff under Judge Benson's order for the purpose of forcing him to change his religion by means of mental abuse. The District Court of Oklahoma County contemplated "deprogram-

ming" Plaintiff. As the Trial Judge observed: "[Judge Benson] knew what this was about, knew what was going to happen, had this presented to him, as it's in the record and his order says as much." When Defendants took Plaintiff for "deprogramming", they misused power, "possessed by virtue of state law and made possible only" through the cloak of state authority in the form of Judge Benson's order. The power and authority which Defendants exercised under Judge Benson's order for confinement, "counseling", "examination" and "treatment" of Plaintiff was "power possessed by virtue of state law and made possible only" as a result of Plaintiff's father and guardian, Defendants' co-conspirator, "being clothed with authority of the state."

Plaintiff's "temporary guardian", Defendants' co-conspirator, possessed power by virtue of state law in the form of Judge Benson's order. Guardianship powers are so identified with the State that since feudal times they have been viewed as an incident of sovereignty. Guardianship powers stem from the "royal prerogative" because the King as "father of the country" functioned as guardian of all persons under a legal or mental disability. "In the United States, the 'royal prerogative' and the 'parens patriae' function of the King passed to the states." *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 257 (1972); *See McIntosh* v. *Dill*, 86 Okl. 1, 205 P. 917, *cert. denied*, 260 U.S. 721 (1922).

Defendants did not merely resort to the courts for the adjudication of a claim and win their case. They assumed the apparent power of the State in the form of Judge Benson's order to force Plaintiff to change his religion. Private citizens do not have the apparent authority to con-

fine, "counsel", "examine" and "treat" another adult citizen against his will. Such apparent authority is only exercisable through color of law.

III. THE DECISION OF THE COURT OF APPEALS THAT DEFENDANTS DID NOT ACT UNDER "COLOR OF STATE LAW" CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT BECAUSE THE INVOLUNTARY "COUNSELING", "EXAMINING" AND "TREATING" OF AN ADULT IS SO IMPREGNATED WITH GOVERNMENTAL CHARACTER AS TO BE SUBJECT TO CONSTITUTIONAL LIMITATIONS.

The action of private persons in confining, "counseling", "examining" and "treating" another adult citizen against his will pursuant to a court order is "so impregnated with governmental character as to become subject to constitutional limitations placed upon state action." *Cf. Evans* v. *Newton*, 382 U.S. 296, 299 (1966) (private devise of realty in trust to a city for a "public" park for white people only). In order for nominally private action to be deemed a governmental function the nominally private conduct must fulfill a function "exclusively reserved to the state." *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. at 157-58, quoting *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974). Because Plaintiff's father was to perform a function unlike an ordinary guardian, the governmental function test was met.

To restate the obvious, only the State can involuntarily confine and "treat" an adult. The only way for an adult to be confined and "treated" is for the entity confining and "treating" to act as the government acts. Unlike the *Flagg Brothers* situation, there is not a variety of

ways to involuntarily confine and "treat" an adult. The function of involuntary confinement and treatment is that of the State. *See Addington v. Texas*, 441 U.S. 418, 426 (1979). It is, and must be, exclusively the function of the state.

IV. THE COURT OF APPEALS HOLDING THAT DEFENDANTS DID NOT ACT "UNDER COLOR OF STATE LAW" WHERE OTHERWISE PRIVATE INDIVIDUALS MISUSED A STATE JUDICIAL PROCEEDING WHICH WAS A NULLITY FOR THE PURPOSE OF EFFECTING CONSTITUTIONAL DEPRIVATIONS IS INCORRECT AND INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

In examining whether misuse of the judicial process could ever be action under "color of law", the United States Court of Appeals for the Tenth Circuit, speaking through the late Judge Murrah, stated in dictum:

> "It is conceivable that persons, either individually or acting in concert might so use the state judicial process as to deprive a person of his property without due process of law, or of equal protection of the laws, yet we are certain that to make out a cause of action under the Civil Rights Statutes, the State Court proceedings must have been a complete nullity, with a purpose to deprive a person of his property without due process of law."

Bottone v. *Lindsley*, 170 F.2d 705, 707 (10th Cir. 1948), *cert. denied*, 336 U.S. 944 (1949). Obviously, the statement would apply with equal force to deprivations of liberty, free exercise of religion and freedom of association. The question is one of first impression.

When nominally private parties are allowed to so misuse the judicial process, they are exercising power that ordinary private litigants do not possess. In such a case the state does more than merely furnish a forum to them. Where the state acts in the absence of all jurisdiction in complicity with nominally private litigants' purpose of depriving a citizen of constitutionally protected liberties and does order such deprivation, the state is no longer disinterested. In such a case the state has become inextricably entangled in the nominally private defendants' actions so as to transform them into state actors.

As the Trial Court found: "Judge Benson knew what this was about, knew what was going to happen, had this presented to him, and it's in the record and his order says as much." The Trial Court further observed "[Judge Benson's] . . . order was to separate . . . [Plaintiff] from the sect, not let him communicate with the sect. That's what the Judge intended and that's what the order says." When the State of Oklahoma took such action without any jurisdiction [see Slip Opinion at 8-11, 13; *see also Mullane* v. *Central Hanover Bank & Trust Co.*, 399 U.S. 306 (1950), *Pennoyer* v. *Neff*, 95 U.S. 714, 752 (1878)], it did not treat the proceeding as just another lawsuit where it merely furnished a forum. It became "interested" as a result of Judge Benson and Defendants' radical departure from the ordinary judicial process in ordering Plaintiff's "deprogramming". The State of Oklahoma clothed Plaintiff's father and Defendants with its authority in a way that ordinary citizens never are. The fact that Judge Benson's role may have been that of an ignorant participant in Defendants' scheme, as opposed to a purposeful participant

in the conspiratorial sense, does not disentangle the state's involvement.

CONCLUSION

For these reasons Walter Robert Taylor, Respondent and Cross-Petitioner, prays that, in the event a writ of certiorari should issue to the United States Court of Appeals for the Tenth Circuit to review that part of its July 30, 1982 judgment which reversed the Trial Court's December 30, 1978 and December 29, 1979 orders granting partial summary judgment against Respondent and Cross-Petitioner and dismissing his claim based upon 42 U.S.C. § 1985, then in such event Respondent and Cross-Petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Tenth Circuit to review that part of its July 30, 1982 judgment which affirmed the Trial Court's December 30, 1978 and July 8, 1980 orders granting partial summary judgment against Respondent and Cross-Petitioner and dismissing his claim based upon 42 U.S.C. § 1983.

Respectfully submitted,

JOHN C. McMURRY
625 N. W. 13th Street
Oklahoma City, Oklahoma 73103
(405) 528-3008

Counsel for Respondent and Cross-Petitioner, Walter Robert Taylor

November, 1982

CERTIFICATE OF SERVICE

The undersigned John C. McMurry, a member of the Bar of this Court and counsel of record for Walter Robert Taylor, Respondent and Cross-Petitioner herein, hereby certifies that on the 19th day of November, 1982, he caused to be served the foregoing Cross-Petition for Writ of Certiorari on all parties by mailing three copies thereof by First Class mail, postage prepaid, to each of their counsel of record, addressed as follows:

Albert R. Vermeire
Monbleau, Vermeire & Turley, P. C.
1510 Financial Center
3443 North Central Avenue
Phoenix, Arizona 85012

John B. Hayes
Looney, Nichols, Johnson & Hayes
P. O. Box 468
Oklahoma City, Oklahoma 73101

William A. Johnson
Sanders, Boone & Johnson
2200 Classen Boulevard, 4th Floor
Oklahoma City, Oklahoma 73106

John C. McMurry

APPENDIX

[Filed July 8, 1980]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

WALTER ROBERT TAYLOR, Plaintiff,	)	
-vs-	)	
KEVIN M. GILMARTIN, MICHAEL E. TRAUSCHT, WAYNE N. HOWARD, FREEDOM OF THOUGHT FOUNDATION, INC., JOSEPH ALEXANDER, ESTHER ALEXANDER, GARY SCHARFF, WALTER WINSTON TAYLOR, SYLVIA TAYLOR, DAVID TAYLOR, and DOES I THROUGH X, Defendants.	)	No. CIV-77-0351-D

ORDER

Plaintiff Walter Robert Taylor brought this action against the above-named Defendants alleging seven causes of action against the Defendants: first, for conspiracy to violate his civil rights, pursuant to 42 U.S.C. §§ 1983 and 1985(3); second, conspiracy to obstruct justice, pursuant to 42 U.S.C. § 1985(2); third, conspiracy to commit medical malpractice; fourth, legal malpractice; fifth, intentional infliction of emotional distress; sixth, conspiracy to falsely imprison; and seventh, conspiracy to commit assault and battery. It is asserted that this Court has juisdiction of the action pursuant to 28 U.S.C. § 1331 (federal question), § 1332 (diversity of citizenship) and § 1343 (civil rights).

Upon consideration of motions to dismiss and motions for summary judgment filed herein by Defendants Howard, Trauscht, Freedom of Thought Foundation, Inc. and the Taylors, the Court on December 30, 1978, entered an Order

and Judgment dismissing Plaintiff's cause of action for conspiracy to violate civil rights brought pursuant to 42 U.S.C. §§ 1983 and 1985(3) and his cause of action for legal malpractice against Defendants Howard and Trauscht. The Court overruled said Defendants' motions as they pertained to Plaintiff's causes of action for conspiracy to commit medical malpractice, intentional infliction of emotional distress, conspiracy to falsely imprison and conspiracy to commit assault and battery. As the Defendants' motions did not address Plaintiff's cause of action for conspiracy to obstruct justice under 42 U.S.C. § 1985(2), the Court did not consider that cause of action in its December 30, 1978, Order and Judgment. Subsequently, Defendants Howard, Trauscht, Freedom of Thought Foundation, Inc. and the Taylors filed motions for partial summary judgment wherein they sought judgment in their favor on Plaintiff's cause of action under 42 U.S.C. § 1985(2) for conspiracy to obstruct justice. On December 28, 1979, the Court granted said motions and dismissed Plaintiff's second cause of action under 42 U.S.C. § 1985(2).

Presently before the Court are the "Combined Motion to Dismiss and Motion for Summary Judgment" and the "Motion to Adopt Previous Court Orders" filed herein by Defendants Gilmartin, the Alexanders and Scharff (hereinafter referred to as "Movants"). Said Motions are supported by a Brief and Plaintiff has filed a Brief in opposition thereto. On July 3, 1980, a hearing was held in connection with the instant Motions as required by Rule 56(c), Federal Rules of Civil Procedure. At said hearing the parties were given an opportunity to present evidence but declined to do so.[1]

---

[1] Also at the hearing, counsel for Plaintiff informed the Court that Plaintiff desired to drop "Does I through X" as parties to this action. Therefore, the Court determines that said parties should be dropped from this action pursuant to Rule 21, Federal Rules of Civil Procedure. Accordingly, as the instant action has recently been dismissed as to De-

In their motions Movants originally asked the Court to dismiss *all* causes of action contained in Plaintiff's Complaint for failure to allege facts sufficient to constitute causes of action against the Movants or in the alternative, that summary judgment in their favor be granted. Movants also asked the Court "to adopt this Court's orders of December 30, 1978 and December 28, 1979 and apply said Rulings to these Defendants." However, at the hearing on the instant Motions, counsel for Plaintiff asked the Court to consider the pending Motions as seeking partial summary judgment with respect to Plaintiff's first and second causes of action under 42 U.S.C. §§ 1983, 1985(2) and 1985 (3) only. In support of the instant motions, Movants have adopted the briefs previously filed herein by the other Defendants in support of their motions for summary judgment and partial summary judgment.

Plaintiff responds that the Court's previous orders do not support dismissal or summary judment as to all of Plaintiff's causes of action.

Upon consideration of the instant motions and the Court's earlier orders in this case, which are hereby incorporated in this Order, the Court is of the opinion that Movants are entitled to summary judgment on Plaintiff's causes of action under 42 U.S.C. §§ 1983 and 1985(3) for conspiracy to violate civil rights and under 42 U.S.C. § 1985 (2) for conspiracy to obstruct justice for the reasons previously set forth in said orders. Therefore, the Court finds and concludes that Movants' "Motion to Adopt Previous Court Orders" should be granted. The Court further finds that Movants' "Combined Motion to Dismiss and Motion

---

1 (Continued)

fendants Walter Winston Taylor, Sylvia Taylor and David Taylor and in view of the Court's decision herein dropping "Does I through X" as party defendants, the correct caption of all pleadings filed hereafter in this case shall omit said Defendants therefrom.

for Summary Judgment" should be granted and judgment entered dismissing Plaintiff's first and second causes of action insofar as recovery is sought against the Movants.

It is so ordered this 8 day of July, 1980.

(s) *Fred Daugherty*
Fred Daugherty
United States District Judge

JUDGMENT ENTERED ON JULY 8, 1980

Office - Supreme Court, U.S.
FILED
DEC 20 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-858

IN THE

Supreme Court of the United States

October Term, 1982

WAYNE N. HOWARD and MICHAEL E. TRAUSCHT,
Petitioners and Cross-Respondents,

v.

WALTER ROBERT TAYLOR,
Respondent and Cross-Petitioner.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

CROSS-RESPONDENTS' BRIEF IN OPPOSITION

MONBLEAU, VERMEIRE & TURLEY, P.C.
By Albert R. Vermeire, *Counsel of Record*
3443 North Central Avenue, Suite 1510
Phoenix, Arizona 85012
(602) 263-0532
Attorneys for Petitioner and Cross-Respondent Howard

LOONEY, NICHOLS, JOHNSON & HAYES
By John B. Hayes, *Counsel of Record*
P. O. Box 468
Oklahoma City, Oklahoma 73101
(405) 235-7641
Attorneys for Petitioner and Cross-Respondent Trauscht

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No. 82-858

IN THE

Supreme Court of the United States

October Term, 1982

WAYNE N. HOWARD and MICHAEL E. TRAUSCHT,
Petitioners and Cross-Respondents,

v.

WALTER ROBERT TAYLOR,
Respondent and Cross-Petitioner.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

CROSS-RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit referred to by both the Petition and Cross-Petition for Writ of Certiorari may now be found in the official reporter as *Taylor v. Gilmartin*, 686 F.2d 1346 (10th Cir. 1982).

STATEMENT OF THE CASE

Cross-Respondents rely upon the statement of the case contained in its Petition for Writ of Certiorari, No. 82-698.

Cross-Petitioner's statement of the case misstates the facts of the case insofar as it omits the fact that following the declaration that Judge Benson's order was void (page 6, Cross-Petition), that declaration was ruled to be of no effect by the presiding judge of the judicial circuit. (See pp. 902-03 of Trial Transcript, Appendix hereto). Jurisdiction over the subject matter was held to reside exclusively in Judge Benson under Okla. Stat. tit. 20 § 95.7. Judge Benson's initial order was in force and effect until he vacated it on August 13, 1976.

The Cross-Petition also contains a misstatement of the facts at page 17, where certain statements are attributed to the trial court without benefit of citation to the record.

Judge Daugherty's remarks, cited out of context, in no way addressed any animus or "state involvement" on Judge Benson's part. Instead, as can be seen from the proper context reproduced in the Appendix hereto, Judge Daugherty was in the first instance relying upon Judge Benson's knowledge of what was to happen in support of his directed verdict on the issue of false imprisonment and in the latter instance was quoting a witness (Scharff), not rendering his own opinion or observation as Cross-Petitioner suggests.

REASONS FOR DENYING THE WRIT

1. THE COURT BELOW CORRECTLY DECIDED THE ISSUE.

The decision of the Tenth Circuit Court of Appeals on the § 1983 claim was correct.

The assertion of Cross-Petitioner notwithstanding, the Court of Appeals did *not* find that there was "state action," but no action taken "under the color of state law."

While the extent to which the Court of Appeals considered these concepts to be distinct is not set forth with the degree of clarity which might be wished, the opinion of that court plainly states:

> *The color of law requirement which is part and parcel of § 1983, Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150, 90 S. Ct. 1598, 1604, 26 L. Ed. 2d 142 (1970), *is not satisfied under the facts of the case.* It is impossible to say that the use of the court as part of the scheme, as occurred here in this case, is enough to constitute *state action.*

Taylor v. Gilmartin, 686 F.2d 1346, 1355 (10th Cir. 1982) (emphasis added).

In a later portion of the opinion, dealing with the § 1985 claim, the Court stated in a footnote:

> It should be clear from our holding on § 1983 in this decision that the defendants' use of the state court to attain what may prove to be unconstitutional goals is not tantamount to action under "color of law" as defined by § 1983. *Id.* at pp. 1360-61, n.9.

Furthermore, the Court of Appeals' opinion on § 1985 did not rest upon a finding of "state action" as that term has come to be used as a term of art in connection with Equal Protection and Civil Rights litigation. Instead, that opinion was based upon the theories that (1) purely private conspiracies to deprive a person of Constitutional rights applicable through the Fourteenth Amendment could be reached by 42 U.S.C. § 1985 without "state action" and (2) that the causal nexus to the state necessary to support a claim for violation of rights guaranteed by the Fourteenth

Amendment was supplied by the unwitting entry of the state into the factual situation as a result of a private conspiracy to induce the state to participate and deprive the plaintiff of his liberty. *Id.* at p. 1358.

A recent decision of this Court has held that conduct which constitutes "state action" is synonymous with action "under the color of state law" in the context of a § 1983 action, *Lugar v. Edmondson Oil Company*, ___ U.S. ___, 102 S. Ct. 2744 (1982).

Two earlier cases from this Court, *Adickes v. S.H. Kress and Company*, 398 U.S. 144 (1970) and *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978) appeared to require a two-pronged analysis in § 1983 cases involving Fourteenth Amendment rights. The first inquiry was whether or not there was "state action"; then a determination was to be made whether the action taken was "under color of state law."

The majority opinion in *Lugar, supra*, explained *Adickes* and *Flagg Bros.* as not in fact requiring the two-pronged analysis, but given the majority's statement that *Lugar* (1) presented a valid § 1983 cause of action insofar as it challenged the constitutionality of a Virginia statute, (2) that it was limited to the context of creditor's rights, and (3) that private misuse of a state statute does not describe conduct attributable to the state, the holding is consistent with that of the Tenth Circuit on the § 1983 question.

Under either analysis, however, the decision of the Court of Appeals was correct, and therefore, needs no review. Whichever analysis is appropriate, some conduct constituting either "state action" or action "under color of state law" must be demonstrated in order to state a claim under s 1983.

As noted by the Court of Appeals, the state's presence in

the factual setting of this matter was insufficient to constitute either "state action" or action taken "under color of state law," and therefore the acts of Judge Benson and the Oklahoma County sheriff's department are not fairly attributable to the State, *Rendell-Baker v. Kohn*, ___ U.S. ___, 102 S. Ct. 2764 (1982); *Lugar v. Edmondson Oil Co., Inc., supra.*

The bare fact that members of the state judicial system are found in the factual setting of a case has never been held to constitute state action. *Evans v. Abney*, 396 U.S. 435 (1970).

Invocation of the state legal process is traditionally a private function for which state office and authority are not needed, *Polk County v. Dodson*, ___ U.S. ___, 102 S. Ct. 445 at 450 (1981).

It has long been held in various circuits, including the 10th, that mere utilization of the state judicial process is insufficient to make the alleged deprivation of fundamental rights attributable to the state, *see e.g., Taylor v. Nichols*, 558 F.2d 561 (10th Cir. 1977); *Torres v. First State Bank of Sierra County*, 588 F.2d 1322 (10th Cir. 1978); *Brown v. Dunne*, 409 F.2d 341 (7th Cir. 1969); *Hall v. McClellan*, 490 F.2d 859 (5th Cir. 1974); *Sykes v. State of California (Department of Motor Vehicles)*, 497 F.2d 197 (9th Cir. 1974).

Furthermore, the plain holding of *Lugar, supra*, is that no § 1983 is made out where only abuse or misuse of a state law is alleged, rather than some Constitutional defect in the law itself. *Lugar v. Edmondson Oil Company, supra*, 102 S. Ct. at 2756.

As the Court of Appeals' opinion notes (and the Cross-Petition admits) neither Judge Benson nor the sheriff's

department were made Defendants or alleged to be unnamed, co-conspirators in this action. The constitutionality of the Oklahoma Statute used (as opposed to its misuse), was *never* an issue. In view of these facts, *Lugar* plainly controls this matter, and there was no § 1983 cause of action.

2. THE CASES RELIED UPON BY THE CROSS-PETITIONER ARE DISTINGUISHABLE ON THEIR FACTS OR ON THE LAW.

Cross-Petitioner relies on a number of cases previously decided by this Court in an effort to demonstrate that the actions of Cross-Respondents constituted "state action" or action "under color of state law." Each of these cases is distinguishable on its facts, and offers no support for Cross-Petitioner's theory.

The case of *Shelley v. Kraemer*, 334 U.S. 1 (1948) is offered for the proposition that judicial enforcement of racially restrictive covenants constitutes "state action." While judicial enforcement of the covenants was a part of the basis for the decision in *Shelley v. Kraemer, supra*, as the opinion in that case plainly shows, the Court's decision was also dictated by the fact that the enforcement of the restrictive covenants was part of and mandated by a pervasive, systematic scheme of unconstitutional racial discrimination which had been imposed by the state by virtue of previous state judicial decision or judicial review. *Shelley v. Kraemer, supra*, 334 U.S. at 21-22.

No comparable systematic state-imposed scheme to deprive persons of their Fourteenth Amendment Rights has been alleged or shown in this case. Even if it were true, as Cross-Petitioner suggests, that Judge Benson's order was completely contrary to statute, this would make his actions *contrary* to the mandate of the state. Under those circumstances,

Judge Benson's conduct could not conceivably be "fairly attributable to the state." Even more critical, *Shelley* dealt with *racial* discrimination, which is not a factor in the instant case.

Racial discrimination, in any form, is not only a violation of Equal Protection under the Fourteenth Amendment, but is unconstitutional independently of the Fourteenth Amendment by virtue of the Thirteenth Amendment's prohibition against involuntary servitude and its badges and incidents. The *Shelley* court could have reached the identical result on the basis of the Thirteenth Amendment alone, without consideration of the Equal Protection claim.

Cross-Petitioner also claims that the actions of Cross-Respondents were "state action" because they were a "misuse of state power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of the state. . ." citing *Monroe v. Pape*, 365 U.S. 167, 184 (1961), and *United States v. Classic*, 313 U.S. 299, 326 (1941).

Both these cases involved instances where officers of the state were defendants and allegedly abused the power of their offices in an unconstitutional manner. Neither of these cases hold that the mere resort to the state judicial process by private parties clothes those parties with the authority of the state, which is the conclusion implicit in Cross-Petitioner's argument.

In both cases, the acts complained of were performed *by the state officers*, not by private parties as is the case herein. The defendants in those cases were "clothed with the authority of the state" by virtue of their positions as state officers, not by reason of any resort to the judicial system. Those opinions furnish no guidance in this matter.

3. CROSS-PETITIONER'S ARGUMENT THAT THE DECISION BELOW WAS CORRECT IS WITHOUT MERIT.

It is asserted in Sections II and III of the Cross-Petition that Cross-Respondents' actions constituted state action because they were possible only because Cross-Respondents were "clothed with the authority of the state" and their acts were "so impregnated with governmental character as to be subject to Constitutional limitations." Cases are cited for the propositions that guardianship is an incident of sovereignty and that only the state can involuntarily confine and treat an adult.

Even assuming, *arguendo*, that these propositions are correct, and further assuming the truth of the material allegations of the complaint, this argument has no merit because it fails to establish any causal nexus between Judge Benson's order and the actions taken by Cross-Respondents subsequent to that order.

Even assuming that there was no jurisdiction for Judge Benson to enter the guardianship order, that order nevertheless only placed Cross-Petitioner in the custody of his father for a limited time and for the purposes of counseling. The order gave no commands as to the nature of the counseling to be given. It contained no orders as to the time, place and circumstances under which counseling could occur. These matters were left to Dr. Taylor and Cross-Respondents, and *decisions concerning actions subsequent to Judge Benson's order were made by them,* without further reference to or involvement with any state officials. The state was no more responsible for the actions of Cross-Respondents in this case than it was answerable for the actions of the private defendants in *Evans v. Abney, supra,* in *Flagg Brothers, Inc. v.*

Brooks, supra, in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) or in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

Cross-Petitioner does not complain of the fact that Judge Benson issued the order; indeed, he was never a defendant. Rather, this dispute concerns the character of the actions taken by Cross-Respondents in connection with the order. It is not asserted, nor could it be, that the courts of Oklahoma lacked the power under any circumstances to make Dr. Taylor his son's guardian or to involuntarily commit Cross-Petitioner for appropriate treatment, if necessary. It is the alleged abuse of that power *by Cross-Respondents, not* an abuse by the state which was the subject of the complaint.

In light of these facts, it cannot be said that the actions complained of by Cross-Petitioner are in any way fairly attributable to the state, *Rendell-Baker v. Kohn, supra.*

CONCLUSION

For these reasons, WAYNE N. HOWARD and MICHAEL E. TRAUSCHT, Cross-Respondents, pray that Cross-Petitioner's Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit be denied.

Respectfully submitted,
MONBLEAU, VERMEIRE & TURLEY, P.C.

By
Albert R. Vermeire
3443 North Central Avenue, Suite 1510
Phoenix, Arizona 85012
Attorneys for Petitioner and
Cross-Respondent Wayne N. Howard

and

LOONEY, NICHOLS, JOHNSON & HAYES
By John B. Hayes
P. O. Box 468
Oklahoma City, Oklahoma 73101
Attorneys for Petitioner and
Cross-Respondent Michael E. Trauscht

December, 1982.

CERTIFICATE OF SERVICE

The undersigned Albert R. Vermeire, a member of the Bar of this Court and counsel of record for Wayne N. Howard, Petitioner and Cross-Respondent herein, hereby certifies that on the 16th day of December, 1982, he caused to be served the foregoing Cross-Respondents' Brief in Opposition on all parties to this appeal by mailing three copies thereof by First Class mail, postage prepaid, addressed to their attorneys, as follows:

Mr. John C. McMurry
625 N.W. 13th Street
Oklahoma City, Oklahoma 73103
Attorney for Respondent and
Cross-Petitioner Taylor

Mr. William A. Johnson
Sanders, Boone & Johnson
2200 Classen Boulevard, 4th Floor
Oklahoma City, Oklahoma 73106
Attorney for Petitioners and Cross-Respondents
Gilmartin, Scharff and Alexanders

_____

Albert R. Vermeire

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

WALTER ROBERT TAYLOR, Plaintiff, -vs- KEVIN M. GILMARTIN, MICHAEL E. TRAUSCHT, WAYNE N. HOWARD, FREEDOM OF THOUGHT FOUNDATION, INC., JOSEPH ALEXANDER, ESTHER ALEXANDER, GARY SCHARFF, WALTER WINSTON TAYLOR, SYLVIA TAYLOR, DAVID TAYLOR, and DOES I THROUGH X, Defendants.	)	No. CIV-77-0351-D

TRANSCRIPT OF TRIAL PROCEEDINGS

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I've very carefully examined the record and I think Judge Benson's Court Order was valid, though I don't think that's necessarily essential to my ruling. He was a State Judge, the record indicates he was regularly assigned here; the record further indicates that the Chief of the Probation Court assigned this case to him and that he heard it and he entered an order of guardianship. This order clearly contemplated a deprogramming type situation with reference to a reluctant, uncooperative ward. I think once Judge Benson had jurisdiction of the Plaintiff in the subject matter of the case, which I believe he did, and entered his order, under Oklahoma law the jurisdiction to handle that case resides in him. The attempt of Judge Halley, by entering an order vacating Judge Benson's order, must be considered without legal force and effect because it violates the Statute of Oklahoma which provides that a Judge to whom a case has been assigned has continuing authority over it, including the determination of post-trial motions, until it's final disposition or until such case is removed from his jurisdiction by the appointing authority. This is 20 Oklahoma Statutes 95.7. There did not appear to have been a transfer order. There does not appear

to have been a removal of Judge Benson's jurisdiction by the appointing authority.

To the contrary, it seems to me that this matter was

Page 903

reviewed by the Chief Judge, or the presiding judge, and, in view of the circumstances, he determined that Judge Benson had continuing authority. Therefore, he had authority from July 15, 1976, when he entered the order, until August 13, 1976, when he vacated the order on the Motion of the Petitioner.

It seems to me that by the very term of false imprisonment, that it can't be sustained when the complained imprisonment of custody is done pursuant to a court order. One of the essential elements of actionable false imprisonment, of course, is in the title itself the word "false," which means it's unlawful. What one does under Court Order, in the way of restraining somebody who is authorized by the court order to do that, can hardly be called unlawful or false. Moreover, I think the evidence in this case indicates that the actual custody of the Defendant by the guardian was not in anyway improper, would not in any way change my decision that reasonable people could not differ with this. *In this connection, it is proper to consider that the Judge knew what this was about, knew what was going to happen, had this presented to him, and it's in the record and his order says as much.* In my view, under the evidence, there's no way to say that the actions of the guardian, and those acting for and under him, transcends or leaves the ambit of the Court's order.

[Emphasis indicates quotation cited out of context at p. 17 in Cross-Petition.]

Page 890

THE COURT: Did they grab him or just move over and he stopped? It seems to me that's what Mr. Scharff testified to. I didn't know that you even claimed that to be a battery.

MR. McMURRY: We are not.

THE COURT: Because you specifically asked your client what the batteries were, he listed three, cold water, hair and the torn pocket. Those are the only three batteries he said he complained of. If you give him the benefit of doubt and throw in the cake, if there was a battery connected with it; I don't think he claimed the telephone incident as a battery.

MR. McMURRY: I'm not claiming it is a battery, Your Honor, I'm claiming it as outrageous conduct.

THE COURT: *Well, Scharff explained why. The Court's order was to separate him from the sect, not let him communicate with the sect. That's what the Judge intended and that's what the order says. Is this outrageous conduct, to follow a Court Order?*

MR. McMURRY: I beg your pardon?

THE COURT: Would it be outrageous for a man to attempt to carry out a court order?

MR. McMURRY: If it's void, Your Honor.

[Emphasis indicates quotation cited out of context, erroneously attributed to trial judge, at p. 17 in Cross-Petition.]